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No. 86-1359

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAUL C. PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Double Jeopardy Clause bars his retrial after the court of appeals reversed his original conviction because of the erroneous admission of his post-arrest admissions.

1. Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiring to possess more than 1,000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to one year's imprisonment. Pet. App. A4. The court of appeals reversed the conviction on the ground that the district court had erred in admitting into evidence certain inculpatory statements made by petitioner following his arrest (*id.* at A14-A18).

On remand, after the government noticed its intention to retry petitioner, he moved for dismissal of the indictment on double jeopardy grounds. Petitioner argued that once the

erroneously admitted statements were excluded, the remaining evidence was insufficient to sustain a conviction. Petitioner contended that since the government failed to present sufficient legally competent evidence at the first trial, it was barred by the Double Jeopardy Clause from having a second opportunity to do so. Pet. App. A4.

The district court denied petitioner's motion. First, it rejected petitioner's suggestion that the sufficiency of the government's case must be judged, for purposes of the Double Jeopardy Clause, without regard to the evidence held inadmissible by the court of appeals. Second, the court concluded that even accepting petitioner's theory, his claim must fail because there was sufficient competent evidence of his guilt, independent of the post-arrest statements, to send the case to the jury. Pet. App. A2, A4.

Petitioner took an interlocutory appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), and the court of appeals affirmed. Relying on this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984), the court of appeals concluded that it was not open to petitioner in these circumstances to raise a double jeopardy claim at all (Pet. App. A5). This Court noted in *Richardson* (468 U.S. at 325) that the protection afforded by the Double Jeopardy Clause arises only "if there has been some event, such as an acquittal, which terminates the original jeopardy." The court of appeals concluded that, just as the defendant's initial jeopardy in *Richardson* was not terminated by the order of mistrial following a hung jury, petitioner's initial jeopardy in this case was not terminated by the court of appeals' decision on direct appeal to grant him a new trial (Pet. App. A8). Such a reversal, the court noted, does not amount to a decision that the government has failed to prove its case. Hence, the court held, it implies nothing regarding a defendant's guilt or innocence. Accordingly, the court concluded that the government should not be prevented from

vindicating society's interest in retrying the defendant and using whatever other evidence it has, including evidence that was not offered at the first trial. *Id.* at A6-A8.

2. Petitioner contends (Pet. 8-9) that the court of appeals erred by extending *Richardson* to preclude his double jeopardy challenge. To the contrary, the result in this case follows directly from *Richardson*. In that case, the Court stated unequivocally that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy" (468 U.S. at 325). The Court then concluded that "the failure of the jury to reach a verdict is not an event which terminates jeopardy" and that a hung jury therefore does not give rise to a double jeopardy claim (*ibid.*).

If "a hung jury is [not] the equivalent of an acquittal" (468 U.S. at 325), it follows as a matter of course that a verdict of guilty is not "the equivalent of an acquittal," even where the guilty verdict is set aside on direct appeal for legal error. Petitioner's conviction was set aside, at his behest, in order to provide him with an error-free trial, not in order for him to escape trial altogether. This Court recognized as much in *Burks* v. *United States*, 437 U.S. 1 (1978), when it distinguished between a reversal for trial error and a reversal for insufficient evidence, and concluded that while the latter provides a double jeopardy bar to retrial, the former does not. The Court stated (*id.* at 15):

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or

> innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Had petitioner's conviction been reversed for insufficient evidence instead of just for trial error, his retrial clearly would be barred. But petitioner did not even assign as error the district court's denials of his motions for judgment of acquittal at the end of the government's case and at the close of all the evidence, nor did he otherwise challenge the sufficiency of the evidence on direct appeal. Thus, there was no occasion for the court of appeals to make any determination as to the sufficiency of the evidence to support his conviction and, hence, no occasion for jeopardy to attach.[1]

3. Petitioner further argues (Pet. 12-13) that once evidence is ruled inadmissible, the court of appeals (or the district court on remand) is obliged to recanvass the remaining evidence to determine its sufficiency. Such an inquiry would not advance the interests protected by the Double Jeopardy Clause, and it could potentially punish the government for not wasting the time of the court and the

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[1]For this reason, the cases petitioner cites (Pet. 7-8) for the proposition that a reviewing court must address the issue of insufficiency of the evidence when it is raised do not help him at all. Those cases all involved claims before the court reviewing the defendant's conviction that the evidence admitted at trial was legally insufficient, a claim that petitioner did not even raise on the appeal from his conviction. Those cases did not involve the claim that the evidence was insufficient once the evidence subsequently held inadmissible was removed from consideration.

jury by overproving its case. The government cannot anticipate all appellate evidentiary rulings,[2] and it should not be obliged to introduce superfluous evidence merely as a backup to ensure against the possibility that some evidence might be excluded on appeal. For these reasons, petitioner's argument has been rejected by every court of appeals that has considered the question. See, *e.g.*, *United States* v. *Hodges*, 770 F.2d 1475, 1477 (9th Cir. 1985); *United States* v. *Key*, 725 F.2d 1123, 1127 (7th Cir. 1984); *Linam* v. *Griffin*, 685 F.2d 369, 373-374 (10th Cir. 1982), cert. denied, 459 U.S. 1211 (1983); *United States* v. *Sarmiento-Perez*, 667 F.2d 1239, 1240 (5th Cir.), cert. denied, 459 U.S. 834 (1982); *United States* v. *Block*, 590 F.2d 535, 543-544 & n.12 (4th Cir. 1978).

Contrary to petitioner's suggestion (Pet. 11-14), there is no conflict among the circuits on the issue presented in this case. Petitioner appears to take the position that other courts of appeals permit a *district court* to determine whether the government's untainted evidence at the first trial would have been sufficient to support the conviction and to grant relief if it would not, even though the *appellate court* may not do so. There is no support for this view in any of the cases that petitioner cites, or in any other federal cases of which we are aware. Rather, the courts of appeals have uniformly held that appellate courts may not grant relief on the ground that the remaining evidence at the first trial—after certain evidence is held inadmissible on appeal—was legally insufficient to support the verdict, and there has

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[2]As the court of appeals acknowledged, "in the present case, the error in admitting the evidence * * * involve[d] a close judgment call which a prosecutor could not be expected to predict" (Pet. App. A8). Furthermore, "[m]erely because it introduced evidence the appellate tribunal ruled inadmissible, the government should not be presumed to have acted wrongfully. The evidence survived the scrutiny of the trial judge" (*ibid.*).

been no suggestion by any of those courts that a district court could grant the relief on remand that an appellate court could not grant on direct appeal.

4. Finally, even if petitioner's contention were accepted, it would not help him. The district court judge, who was thoroughly familiar with the facts of this case, specifically found that even without the illegal evidence the government's case against petitioner would have been sufficient to send the case to the jury (Pet. App. A2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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